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SUMMARY RECORD OF THE 1084th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 22 July 1991, at 3 p.m.

Chairman: Mr. POCAR

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The meeting was called to order at 3.20 p.m.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 2) (continued)

General comment on article 7 of the Covenant (CCPR/C/42/CRP.2) (continued)

Paragraph 10

1. The CHAIRMAN invited members to consider the paragraph as set out in document CCPR/C/42/CRP.2, together with the amendment suggested by Mrs. Higgins which would add the following text: "The Committee recommends that the time and place of all interrogations be recorded, together with the names of all those present. This information should be open to the detainees' lawyers and family."

2. He recalled his suggestion, made at the previous meeting, that the text should begin with the words "To the same effect".

3. Following an exchange of views between Mr. AGUILAR URBINA, Mr. EL SHAFEI, Mr. MAVROMMATIS and Mr. HERNDL, the CHAIRMAN read out for the Committee's consideration the following amended text for the second part of paragraph 10, following the words "cases of torture and ill-treatment": "To guarantee the effective protection of detained persons, provision should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention to be in a register available to those concerned, such as relatives and friends. To the same effect, the time and place of all interrogations should also be recorded, together with the names of all those present and this information should also be open to those concerned. Provision should also be made against incommunicado detention. The minimal protection of the detainee consists of having prompt and regular access to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members as a guarantee for the increased protection of the detainee. In any case, prolonged isolation of the detainee or imprisoned person may amount, in the view of the Committee, to an act prohibited by article 7." He thought that provision might also be made for recording the names of the persons in the places of detention who had direct care of the detainees, since they might commit acts of torture before a detainee was interrogated. He further suggested that the words "such as relatives and friends" should either be amended to read "including relatives and friends" or deleted.

4. Mr. HERNDL said that he could accept the Chairman's suggestion to replace the words "such as relatives and friends" by "including relatives and friends" because the latter had a right to know where the detained person was held. However, with regard to the second sentence of the text read out by the Chairman, he was opposed to the use of the words "to those concerned" because the information in question should be restricted to the detainee and his lawyer and should not be open to the family and friends of the detainee.

5. The CHAIRMAN said that it was not a matter of making available a transcript of the interrogation but rather of providing information on the time and place of detention as well as the names of the persons present.

6. Mr. HERNDL said that if such information was made generally available, undue pressure might be brought to bear on those who were present during the interrogation, which might even cause them to cease participating in the investigation. Only the detainee, his lawyer and the authorities should have access to the information in question.

7. After an exchange of views in which Mr. LALLAH, Mr. WENNERGREN, Mr. AGUILAR URBINA and Mr. MAVROMMATIS took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that the first sentence of the text he had read out would end with the words "to those concerned", the reference to relatives and friends being deleted. Furthermore, he took it that members agreed to replace the first sentence by the following text: "To guarantee the effective protection of detained persons, provision should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as the names of persons responsible for their detention, to be kept in a register available to those concerned."

8. It was so decided.

9. Paragraph 10, as amended, was adopted.

Paragraph 11

10. The CHAIRMAN drew the Committee's attention to Mrs. Higgins' suggestion to redraft paragraph 11 to read: "In the Committee's opinion, protection against torture and other treatment prohibited in article 7 cannot be made effective if statements obtained through these means are admissible as evidence in judicial proceedings."

11. Miss CHANET said it had been pointed out to her in connection with discussions in the Committee against Torture that the proposed wording was meaningful for the common law system under which it was first determined whether evidence could be admitted before it was used. Under the continental system, however, the principle of innermost conviction prevailed whereby a magistrate was not required to specify the evidence which he had taken into consideration in arriving at that conviction. Therefore, under the former system, a statement which had been obtained through torture would necessarily be invalidated if that fact came to light, whereas under the latter system there was no way of obliging the magistrate concerned to disregard the statement inasmuch as his conviction was a personal one and it was not necessary to give details of the evidence on which it was based. She could not therefore agree to the paragraph as proposed by Mrs. Higgins, although she was not opposed to the idea behind it, which might better be conveyed by amending the text in document CCPR/C/42/CRP.2.

12. Mr. AGUILAR URBINA endorsed the comments made by Miss Chanet.

13. Mr. MAVROMMATIS pointed out that, even under the common law system, views were divided concerning evidence disclosed by an inadmissible confession. He suggested that the reference in the paragraph should not be to "statement" in general but to "incriminating statement". He was impressed by Miss Chanet's arguments and was in favour of retaining paragraph 11 with certain amendments.

14. Mr. MYULLERSON supported Miss Chanet's observations, although she approached the question not so much from the point of view of common or continental law as from that of the terms of the Covenant. Article 7 of the latter was an imperative prohibition, even in times of emergency, and was a crucial element of the Covenant. It should be affirmed, irrespective of different legal systems, that, in the event of a violation of article 7, the evidence thus obtained should not be used in legal proceedings. He further suggested that the word "properly" in paragraph 11 should be deleted.

15. Mr. AGUILAR URBINA, referring to the latter point, observed that, while he himself and most members of the Working Group would have preferred to omit the word "properly", it had been included in square brackets because it might apparently have some importance in some legal systems, for instance that of Sweden.

16. Mr. WENNERGREN said that it was for the court to decide what kind of evidence was admissible. Therefore, respect for the independence of the court might be more clearly maintained if the word "invoked" rather than "used" was employed. Alternatively, the paragraph might even be strengthened by indicating that "any statement ... should be disregarded by the courts".

17. Mr. LALLAH said that he preferred an amendment along the lines indicated by Miss Chanet to a complete redrafting of the paragraph. He also supported Mr. Mavrommatis' suggestion to insert the word "incriminating". Concerning Mr. Wennergren's argument, he did not think that the independence of the judiciary was brought into question by indicating that any statement obtained through torture could not be used. Moreover, it was for the court to decide on the character of the statement.

18. The CHAIRMAN proposed wording to the effect that legislation must prohibit the use of an incriminating statement as evidence.

19. Mr. AGUILAR URBINA said that he could agree with the Chairman's suggestion but was not convinced by Mr. Wennergren's argument.

20. Miss CHANET pointed out that the word "invoked" was used in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, there was a certain ambiguity in the term as it was interpreted differently under different legal systems.

21. Mr. LALLAH supported the Chairman's suggestion but proposed that the wording should be sub-amended to read: "... the law should prohibit the use or admissibility of incriminating statements obtained through torture or other treatment prohibited by article 7".

22. The CHAIRMAN took it that the Committee wished to adopt paragraph 11, subject to that amendment.

23. It was so decided.

Paragraph 12

24. The CHAIRMAN drew attention to Mrs. Higgins' suggestion to redraft the first sentence of paragraph 12 to read: "States parties ... specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons". He observed that the point might, however, be met by slightly amending the wording of document CCPR/C/42/CRP.2 to replace "individuals" by "private persons".

25. Mr. EL SHAFEI said he supported the change of order as contained in Mrs. Higgins' suggestion; a reference to "public officials" should precede "private persons". He also agreed with her that the second sentence was difficult to understand and suggested its deletion.

26. Miss CHANET agreed that the second sentence should be deleted. As the Committee's general comments did not have the status of a legal text, however, she did not attach any particular importance to the order in which "private persons" and "public officials" were mentioned.

27. Mr. MYULLERSON opted for the wording, and the sequence, proposed by Mrs. Higgins for the first sentence of paragraph 12: the acts referred to were, as a general rule, more frequently committed by public officials or persons acting on behalf of the State than by private persons.

28. He, too, failed to understand the sentence in square brackets in the draft.

29. Mr. NDIAYE submitted that the general comment was principally concerned with torture or other forms of maltreatment in official places of detention. He found it difficult to see how private persons could commit such acts in that environment, and consequently wondered whether it was relevant to mention them.

30. Protection was largely the subject of paragraphs 9 and 10; the sentence in square brackets thus seemed superfluous.

31. Mr. WENNERGREN said he understood the concern expressed in the sentence in square brackets to be with ensuring that protection would be afforded to victims of torture or ill-treatment who dared to denounce those responsible: experience had shown that the fear of reprisals could effectively muzzle complaint. That concern was thus laudable, but it was difficult to conceive, in practical terms, how such protection could be assured: it would be difficult to impose an interdiction on the offender.

32. The CHAIRMAN said he took it that the Committee agreed to the deletion of the sentence in square brackets.

33. It was so decided.

34. Mr. LALLAH said that the focus of paragraph 12 seemed to be somewhat blurred: was the principal concern with deterrence or with sanctions? If it was with the former, then mention should perhaps be made not only of criminal law but also of civil redress. He also failed to seize the link established with paragraph 13 by beginning the latter with the word "Accordingly".

35. It was true that a principal concern was with acts committed by public officials in places of detention, although it was well known that in certain countries it was common practice for public officials or individuals acting on behalf of the State to dress in civilian clothing while committing acts that were prohibited by article 7. Perhaps paragraph 12 might be redrafted to indicate specifically that the general comment also covered acts of torture committed by private persons, and to bring out the Committee's view that provision should be made both in criminal and civil law to ensure the prohibition of torture, and that States parties should deal with those matters in their reports.

36. The CHAIRMAN said that he personally was unable to subscribe to the restrictive interpretation offered by Mr. Ndiaye. He pointed out that there were many private educational, medical or other establishments where acts of torture might be committed. In his view, the general thrust of paragraph 12 was to state that torture must be seen as a crime by the law. He pointed out to Mr. Lallah that redress was the subject of paragraph 14 of the general comment.

37. Mr. WENNERGREN remarked that acts tantamount to torture were by no means infrequent in private life, and that included relations between spouses. In his view, States parties must take cognizance of that reality, and see to it that torture was prohibited under all circumstances, and that protection and compensation were accorded to the victims.

38. Mr. EL SHAFEI said that perhaps even more worthy of attention were acts of kidnapping, associated with torture, also carried out by private persons.

39. Mr. NDIAYE said that the acts referred to by the previous two speakers were generally qualified under other headings, such as assault and battery or illegal restraint; he did not consider them to be a concern under article 7 of the Covenant.

40. Mr. LALLAH, conceding Mr. Ndiaye's point, observed that in its earlier general comment 7 [16] the Committee had none the less agreed that article 7 protected not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions; it would be unfortunate to give the impression in the new general comment that the article was only concerned with acts by public officials. He further drew attention to the view adopted by the Committee in paragraph 5 of the text under consideration that the prohibition in article 7 must also extend to corporal punishment, including chastisement ordered as an educative or disciplinary measure. Thus, although he agreed that the main thrust of paragraph 12 should be in the direction of public officials or other persons acting in an official capacity, acts by private persons should also come within its scope.

41. Mr. WAKO remarked that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the title of which matched word for word the text of article 7 of the Covenant, appeared to cover only acts inflicted by or at the instigation of a public official or other person acting in an official capacity. He doubted whether article 7 of the Covenant could or should be interpreted in a broader sense than that, especially when - as Mr. Ndiaye had remarked - the acts alluded to by other speakers, such as wife-beating or husband-beating, were covered under other headings of the law, or when, as in the case of "corporal punishment" or "chastisement", they were most difficult to define. His own view was that the Covenant as a whole was addressed to acts attributable in some way to the State, in other words committed by public officials or persons acting in an official capacity, and that torture or other forms of ill-treatment perpetrated between private individuals did not fall within the purview of article 7.

42. Mr. MYULLERSON, reiterating his support for Mrs. Higgins' proposal, said that, while he could agree that violence - for example, domestic violence - between private persons was not really covered by article 7, other acts by private individuals might well be. He recalled that it had been agreed, in the context of the draft articles on State responsibility, that the State was accountable not only for its acts but also for its omissions. Thus, if a private individual committed acts that violated the norms of international law and if the State concerned was enjoined to prohibit and prevent such acts, the State also incurred responsibility under international law. That was what he understood to be the reasoning behind the inclusion of a reference to private persons in paragraph 12 of the draft general comment, and of the reference to "persons acting outside or without any official authority" in general comment 7 [16].

43. Mr. AGUILAR URBINA concurred with the previous speaker: given the contents of the earlier general comment, to neglect to mention private persons in the new one would constitute a retrograde step. He added that in a world where torture was becoming more and more sophisticated and more and more widely practised by what could be described as individuals acting in a private capacity, the State should be held responsible to the fullest extent, for otherwise victims might be left unprotected. He endorsed the formulation proposed by Mrs. Higgins.

44. Miss CHANET agreed that the Committee's previous general comment on article 7 dealt with the protection owed by the State to all victims of torture, whether committed by officials or by individuals acting without authority. It had never, however, addressed the question of penalties in the case of torture inflicted by private persons. That concept was new with regard both to the Committee's own thinking and to the Convention against Torture itself.

45. Paragraph 2 of the general comment under consideration already gave it as the Committee's view that it was the duty of the State party to afford protection against the maltreatment prohibited by article 7 "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity". She therefore wondered whether it was necessary virtually to reiterate that statement in paragraph 12, which suggested that States should have two sets of penalties, one applicable to acts committed by

public officials or persons acting on behalf of the State, and the other applicable to acts committed by individuals. Given the content of paragraph 2, would it not satisfy the Committee's purpose merely to state in paragraph 12 that "States parties should indicate in their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment, specifying the penalties applicable"?

46. The CHAIRMAN said that he considered torture to be among the most serious of crimes; he would be reluctant to admit that in a State an act of torture committed by an individual might not be sanctioned under criminal law. Personally, he would be in favour of strengthening paragraph 12 still further by indicating that torture should be the subject of criminal proceedings and regularly reported on in consequence. Those personal feelings apart, he would point out that article 7 was one of those of the Covenant that were couched in the most general of terms: he did not believe that the drafters had intended it to admit of any exceptions. Moreover, as had already been observed, it would be unfortunate to endorse a narrower interpretation of article 7 than that which had been approved by the Committee in the past.

47. Mr. NDIAYE agreed with Mr. Pocar that torture constituted a particularly odious act, that it should be considered as a crime, and that it should be prohibited. But for that very reason, the greatest circumspection should be observed in determining what was to be considered as torture, for using the term too lightly would rid it of its meaning. He added that the notion of two sets of sanctions, one for officials and one for private persons, appeared to him to be dubious. Might it not be best merely to insist that States parties had a special responsibility for the repression of torture, particularly in criminal cases?

48. Mr. WENNERGREN observed that, whereas in its earlier general comment on article 7 the Committee had alluded to corporal punishment and chastisement, they were not mentioned in the draft under review. He realized that the particular concern of the Committee in the present instance was with torture, but he wondered how the texts of the two general comments would be articulated.

49. Mr. LALLAH said that his earlier uncertainty with regard to the purpose of paragraph 12 had now been resolved: he understood the paragraph to express the view that torture was so grave an act that it must be criminalized. He had no quarrel with that, but some members had spoken of extending the coverage of the paragraph to include punishment. In that case, what would be the situation with regard to punishment which was undoubtedly cruel, inhuman and degrading, such as whipping or flogging, but which in some States was legal? If the law made an act permissible, how could it be subject to penal sanctions?

50. That being said, he himself was particularly concerned with the treatment meted out in private clinics and medical institutions in certain countries, where organs were removed from individuals for transplant on a commercial basis or for medical experimentation. Such activities, conducted essentially for profit, appeared to him to fall within the scope of article 7 of the Covenant.

51. Again, there were acts between private persons that could certainly be construed as amounting to cruel, inhuman or degrading treatment, if not to torture, for the purposes of the Covenant. Referring to the new jurisprudence in a number of countries concerning sexual violence within wedlock, he remarked that the act of conjugal rape could assume particularly savage and humiliating forms which should undoubtedly be subject to criminal law.

52. It was his feeling that, as they stood, paragraphs 12 and 13 did not address sufficiently clearly all the various aspects of the matter that had been touched upon during the discussion.

53. Mr. SERRANO CALDERA said that initially the intention had been to protect individuals against an authority which was liable to perform or countenance inadmissible acts, but article 7 of the Covenant was sufficiently broad in scope to be applied to a wide range of situations. Torture was normally the expression of some form of political or ideological reprisal against individuals, but sociological behaviour studies had shown it to extend from the public into the private field. For example, a slap across the face by a wife or husband could not be regarded as torture, but other domestic acts such as child abuse certainly could. Such acts should be covered both by the law - in other words criminalized - and by the Covenant. Miss Chanet had quite rightly pointed out that there was no need to labour the point in paragraph 12 when it had already been spelt out clearly in paragraph 2. The wording of article 7 was sufficiently broad to cover persons acting either in a public or in a private capacity.

54. The CHAIRMAN said that he personally would like to see the wording of paragraph 12 strengthened, so as to ensure that States parties really did penalize the acts concerned and specified in their reports the penalties imposed on the various categories of persons inflicting torture.

55. Mr. LALLAH said that there could of course be no objection to that approach, but it was also important to look at the previous general comment on the subject, to make sure that nothing valuable had been omitted.

56. Mr. NDIAYE said that a wide range of acts were already prohibited under article 7. It could be counter-productive and misleading to attempt to apply the term "torture" too loosely, for instance to corporal punishment administered to a pupil by a teacher.

57. Mr. ANDO, referring to Mr. Lallah's remarks, said he did not believe that anything of great value had been omitted from the new general comment. Paragraph 5 had extended the prohibition to acts by private persons and in paragraph 8 States parties were asked to define acts which might not go unpunished. In paragraph 12 the Committee was now merely reiterating the punishment aspect; it was not asking States parties to criminalize all acts which ran counter to article 7, but to report on the provisions of the law which rendered particular forms of behaviour criminal. It was still left to States parties themselves to determine what penalties should be imposed.

58. The CHAIRMAN said that apparently the Committee wished to maintain the text of the first sentence as it stood.

59. Paragraph 12, as amended, was adopted.

Paragraph 13

60. The CHAIRMAN drew attention to Mrs. Higgins' proposal to add the words "and acted upon promptly" at the end of the first sentence.

61. Mr. HERNDL suggested that Mrs. Higgins' amendment would fit in better in the second rather than in the first sentence of paragraph 13.

62. Mr. MAVROMMATIS said that the important element of promptness introduced by Mrs. Higgins' amendment could be incorporated by rewording the second sentence to read: "Complaints must be promptly and impartially investigated by ...".

63. Mr. EL SHAFEI proposed the deletion of the word "Accordingly" from the beginning of paragraph 13, since there was in fact no consequential link between paragraphs 12 and 13.

64. Paragraph 13, as amended, was adopted.

Paragraph 14

65. The CHAIRMAN noted Mrs. Higgins' proposal to insert the words "and appropriate medical care" after "compensation".

66. Miss CHANET said that in her view it was not really appropriate to mention medical care in paragraph 14. In some cases psychological rehabilitation might be more important. In fact it might be better in general to refer to rehabilitation rather than compensation. Either the original text should be retained or the Committee could reproduce the relevant wording from the Convention against Torture.

67. Mr. NDIAYE said that the term "civil right" in the final sentence was not very well chosen, since it implied an administrative rather than a legal right.

68. Mr. EL SHAFEI said that the meaning of the last sentence was not clear. It should state categorically that the criminal amnesty of persons guilty of such offences should not be allowed to affect the victim's right to sue for compensation.

69. Mr. LALLAH said that the two points which had to be stressed - either in paragraph 13 or in paragraph 14 - were the need for compensation for the victim and the immediate halting of the illegal treatment. It was therefore important for the Committee to know whether the State party's legislation provided for the immediate cessation of the illegal acts.

70. Mr. MAVROMMATIS said that there were two options open to the Committee: either to refer to medical treatment (or rehabilitation) or, as Miss Chanet had suggested, to follow the wording of the Convention against Torture.

71. The CHAIRMAN suggested that the Chairman of the Working Group under article 40 should be requested to prepare a revised paragraph 14, based on the suggestions made, for consideration by the Committee at its next meeting.

72. It was so decided.

The meeting rose at 6 p.m.